IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.796 OF 2004
IN
NOTICE OF MOTION NO.2705 OF 2004
IN
S.C. SUIT NO.3112 OF 2004

Piroja Court Co-operative
Housing Society Ltd. & Ors. ... Appellants

V/s.

Ellesmere Cobndominium & Ors. ... Respondents

Mr.S.A. Ahmed i/b M/s.Thakker & Balli for Appellants
Mr.R.A. Thorat for Respondents

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **OCTOBER 19, 2004**

P.C.:

. This Appeal from Order has been filed against the impugned order dated 9.8.2004 under which the Notice of Motion has been made absolute and the appellants-defendants had been restrained by a temporary injunction from obstructing, disturbing or interfering with the full and free right and liberty of way with or without horses, cattles and other vehicles over and above the road delineated in the colour brown on the land being Exhibit B to the Motion.

2. It is submitted on behalf of the appellants that the trial Court, while granting temporary injunction,

has failed to consider the basic issue as to whether the plaintiffs, that is, the respondents herein, have made out a prima facie case warranting interim relie. The learned advocate for the Appellants submits that the Respondents have failed to establish that the balance of convenience and equities are in their favour. According to the appellant the terms of the conveyance are void as they do not comply with the provisions of section 11 of the Transfer of Property Act and, therefore, no injunction could have granted in respect of the terms of covenant which are void. The learned Advocate for the appellants also submits that although the case has been pleaded in the plaint regarding section 11 of the Transfer of Property Act, the plaintiffs have sought to make out a case under section 8 of the Indian Easements Act 1882. He submits that an easement could have been granted only by the appellants to the respondents and, therefore, no relief could have been granted by the trial Court at this interim stage to the Respondents. He further contends that there is an access to the property known as Ellesmere from the main road along Shanti Road; instead of using this road, the plaintiffs are seeking to enforce the covenant which is void and use the property of the appellant as a thoroughfare.

3. Mr.Thorat, learned Counsel for the Respondents, submits that although according to the appellants, the

conveyance is void or at least some of them of terms in the conveyance are void, no steps have been taken by the appellants to challenge these terms or clauses in the conveyance. He submits that the respondents have approached the trial Court on the basis of the conveyance under which certain rights were given to the transferor of the property as well as his assignees, heirs, etc. He submits that the respondents have only sought to enforce the rights available to them under the conveyance. The suit seeks a declaration of the right to have free access through the property of the appellants in order to reach the property known as Ellesmere, and an injunction. No other reliefs are sought for. He submits that Respondents are insisting on the right of access on the basis of the conveyance.

4. Having heard the learned Counsel for both the parties, I am of the view that the trial Court has considered all the questions raised. The trial Court has considered the fact that it is in exercise of the rights of the respondents, given under the conveyance, that the respondents have sought to claim the right of way through the adjoining property held by the Appellants. Further, the conveyance also indicates that it is not only plaintiff No.2, as sought to be made out by the appellants, who is entitled to the right of way but also the other owner or occupiers of the property

known as Ellesmere. In view of this, I see no reason to disturb the findings of the trial Court which obviously are prima facie in nature.

5. What is the effect of the deed of conveyance and whether any clauses in the conveyance are void are not matters which need to be decided at this stage especially when those clauses have not been challenged by the appellants either by filing a counter claim or through any independent proceeding. In view of this, Appeal from Order is dismissed. No costs.

6. In view of the dismissal of the Appeal from Order, Civil Application No.1081 of 2004 does not survive, and the same is disposed of accordingly.